



STATE OF INDIANA

OFFICE OF THE ATTORNEY GENERAL

TODD ROKITA
INDIANA ATTORNEY GENERAL

INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
302 WEST WASHINGTON STREET, INDIANAPOLIS, IN 46204-2770
www.AttorneyGeneral.IN.gov

TELEPHONE: 317.232.6201
FAX: 317.232.7979

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OFFICIAL OPINION 2021-2

The Honorable John Crane
Indiana Senate
200 W. Washington Street
Indianapolis, Indiana 46204

The Honorable Michelle Davis
Indiana House of Representatives
200 W. Washington Street
Indianapolis, Indiana 46204

RE: Black Lives Matter as a Political Organization

Dear Senator Crane and Representative Davis:

You requested an opinion regarding whether Black Lives Matter is a political organization and, if so, what constitutional implications may arise when promoting or displaying Black Lives Matter materials in the educational setting while prohibiting others.

QUESTION

1. Are Black Lives Matter and similar organizations political organizations?
2. Are there First Amendment or other policy considerations for public school corporations if the school corporation or a school within the school corporation permit politically based materials or speech promoting (or protesting) certain organizations while prohibiting the promotion (or protesting) of others?

BRIEF ANSWER

1. Yes, Black Lives Matter is a political organization.
2. Yes. School corporations should be cognizant that promoting or displaying some politically based materials while prohibiting the promotion or display of others could be seen as arbitrary and capricious and could also be violative of the First Amendment. School corporations need neutral, uniform policies that are applied in a consistent manner.

ANALYSIS

Black Lives Matter as a Political Organization

The seminal question is whether Black Lives Matter (“BLM”) is a political organization. BLM is a term representing a group of ideas and movements. There are several groups globally whose advocacy focus is BLM. The most prominent and well-known BLM group in the United States, and worldwide, is Black Lives Matter Global Network Foundation (“BLMGNF”). Unless otherwise noted, for purposes of this Opinion, “BLM” will refer generally to BLMGNF and affiliated organizations.

On July 14, 2020, the United States Office of Special Counsel (“OSC”) issued a memo regarding whether BLM and the BLM “organization” (OSC was referring to BLMGNF) was political.¹ Importantly, the OSC provided guidance on federal employee activity onsite during working hours and was specific to the Hatch Act, a federal statute.² The OSC noted in Footnote 1 of the memo its analysis was based upon BLM activities “at the time of writing.” In its letter, the OSC acknowledged that if BLM’s activities changed in the future, then OSC “would reevaluate the group,” and likely change its conclusion that BLM was not a “partisan political party.” The OSC noted that BLM’s website focused on “issue advocacy,” and importantly, that it did not have any candidate endorsements or descriptions of partisan political activity. “Political activity” is activity directed toward a specific political party or candidate, and a “partisan political group” is any group 1) affiliated with a political party or candidate in a partisan election; 2) organized for a partisan purpose; or 3) which engages in partisan political activity.³

Subsequent political activities of BLM have caused this analysis to shift, while supporting a conclusion that the original determination by OSC is outdated. In October 2020, BLM formed a political action committee (“PAC”), citing its inaugural list of political candidate endorsements and noting its success in raising funds to “actively engage” in the 2020 election.⁴ Its 2020 Impact Report notes the PAC’s endorsement of several Democratic Party candidates, and includes references to voting for the Democratic Party and Joe Biden.⁵ Moreover, a former Executive Director and co-founder of BLM is also a co-founder of the BLM PAC, making it further difficult to argue the two are separate and distinct.⁶ The creation of the BLM PAC and the relationship of

¹ <https://www.usgs.gov/media/files/office-special-counsel-advisory-black-lives-matter-and-hatch> (last accessed Sept. 1, 2021).

² The Hatch Act limits certain political activities of federal employees, and some state and local government employees who work with federally funded programs. It ensures the programs are administered in a nonpartisan fashion, protects federal employees from political coercion in the workplace, and ensures they are advanced based on merit and not political affiliation.

³ 5 C.F.R. § 734.101

⁴ <https://blacklivesmatter.com/wp-content/uploads/2021/02/blm-2020-impact-report.pdf> at p. 24 (last accessed Sept. 1, 2021).

⁵ *Id.* at 25 and 27.

⁶ Patrisse Cullors, one of the founders and executive directors, recently stepped down as an executive director amidst questions surrounding how organization funding was handled. It is unclear if she will still be part of the BLM PAC. <https://apnews.com/article/ca-state-wire-george-floyd-philanthropy-race-and-ethnicity-0a89ec240a702537a3d89d281789adcf> (last accessed Sept. 1, 2021).

the co-founder within both organizations raises the question of whether the BLM can now be considered “political,” or, as the OSC has already framed – whether the BLM is an organization engaged in “partisan political activity.”

Given the additional activities, post-July 14, 2020, that now put BLM squarely in the classification of a political organization, any reliance on the OSC guidance memo by schools (or the Indiana Department of Education (“IDOE”), to the extent it had relied on the memo in the past) is no longer valid. It should also be reiterated that the OSC letter was guidance for federal employees in relation to the Hatch Act, which does not apply to public school corporations. As a result, the OSC guidance should not be relied upon by school districts or the IDOE in any way. Regardless of the OSC memorandum, BLM’s activities since July 2020 indicate its intent to become more politically oriented and the Indiana Office of the Attorney General considers it to be a political organization. With the aforementioned in mind, this analysis will now turn to First Amendment considerations pertaining to materials of BLM (and political organizations generally) promotion and display in the educational setting.

First Amendment Considerations

Because the topic concerns a political organization and, therefore, potentially political speech and expression, it is prudent to discuss possible First Amendment implications on promoting or prohibiting teaching BLM or displaying BLM materials in an educational setting. This can include the display of signs in school hallways or teacher classrooms, informal classroom discussions or formal lessons, or others forms of expression and speech by student-led organizations, teachers, and the schools. The legal analysis for teacher-led and student-led political speech is different, but both are more limited within a school setting than outside of one. As public employees, teachers’ speech during work time is part of their “official duties” and is generally not protected under the First Amendment, except in a very narrow circumstance. Students and student organizations have more general First Amendment protections for political expressions, but such expression must not disrupt or interfere with the learning environment. This section will discuss both teacher-led and student-led speech.

Teacher-led speech and expression

The Indiana Office of the Attorney General understands most Indiana teachers are educators because they maintain a passion for teaching children and do not wish to use classroom time as an indoctrination tool to push their political, religious, or other social views on the youth in their care. The questions presented do not ask about the legalities or appropriateness of BLM materials, lessons or indoctrinations and their presence in curriculum. As such we limit our legal analysis to the inevitable questions that may arise in the event a teacher diverts from a school’s approved curriculum and seeks to promote a personal or political agenda to Indiana students.

Public employees’ speech is generally subject to a “special set of rules” where the First Amendment is circumscribed, unless the employee is speaking as a member of the public or as a citizen “on a matter of public concern.” *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713,715 (7th Cir. 2016); *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). When analyzing a First Amendment case involving a public employee, courts will first examine whether

the employee spoke as a citizen on a matter of public concern. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968). If the employee spoke in the course of his or her official duties, then the employee was not speaking as a citizen and such speech is not protected under the First Amendment. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Seventh Circuit has held that this analysis applies to teachers as well. *Mayer*, 474 F.3d 477 (7th Cir. 2007); *Brown*, 824 F.3d 713 (7th Cir. 2016). The First Amendment analysis ends here if the teacher was speaking in the course of his or her official duties as a teacher. If the employee was speaking as a citizen on a matter of public concern, the court proceeds to the analysis of whether the government had adequate justification for treating the public employee differently than any other member of the general public. *Pickering* 391 U.S. at 568.

In-classroom speech is done in the course of “official duties” as referred to in *Garcetti*. *Brown*, 824 F.3d at 715; *Mayer*, 474 F.3d at 479. Courts have held that educators are paid to teach the curriculum adopted by the school district, not substitute their own opinion or lessons, as children have no choice but to listen to the teacher’s speech. *Mayer*, 474 F.3d at 479, 480. It is not a First Amendment violation to require a teacher to teach the adopted curriculum and prohibit the teacher from covering external topics or advocating personal viewpoints. *Ibid.* Furthermore, children should expect greater protection from such viewpoints when attendance at school is mandatory. See *Id.* at 479 (“Children who attend school because they must ought not be subject to teachers’ idiosyncratic perspectives.”). It is simply improper for teachers to indoctrinate children to their own social and political values. See *Id.* at 479-80. (“...if indoctrination is likely, the power should be reposed in someone the people can vote out of office....”)

The *Mayer* court noted that in the case of teachers, school districts are not regulating their speech; rather, they have hired them for a specific speech (i.e., a curriculum). *Mayer*, 474 F.3d at 479. The First Amendment protections do not permit teachers to “present personal views to captive audiences against the instructions of elected officials” and doing so runs the risk of indoctrination. *Id.* at 479, 480. As is evident, there is a strong public policy reason for circumscribing the First Amendment protections of teachers while they are in the educational setting.

While most cases have involved actual speech, it follows that the same analysis would apply to the display or exhibition of other material as well. Students are “captive audiences” in the classroom regardless of whether the teacher is speaking, so whatever is displayed in the classrooms, hallways, or on cafeteria walls, the students are exposed to those messages. They are subject to the announcements over the loudspeakers, television screens, and tablets. Students are at the mercy of what the teacher displays in his or her classrooms or places in the lessons, so like “speech,” political expression would also be circumscribed under this same rubric.

Student-led speech and expression

In addition to the above considerations, the General Assembly has established a strong interest in protecting the free speech rights of students. However, First Amendment concerns become elevated when a school district attempts to compel students to confirm or declare certain

personal beliefs.⁷ Courts are also sensitive to freedom of political expression among students in the school setting. Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923).

Student political expression is generally protected if it is not disruptive or does not materially interfere with school activities. *Tinker*, 393 U.S. at 514. However, lewd, vulgar, or offensive expression, or speech that encourages illegal activity may be prohibited and circumscribed. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007). Courts acknowledge that students do not enjoy the same level of First Amendment protection within the school walls as an adult does outside of them. *Fraser*, 478 U.S. at 685. Schools may also regulate the content of school-sponsored literature and other “expressive activities” as long as such regulation is “reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Although courts generally defer to school districts in matters of education and schooling, they will look closely at claims of First Amendment violations from students. See generally *Tinker*, *Morse*, *Fraser*, *Hazelwood*; see also *Mahanoy Sch. Dist. v. B.L. by and through Levy*, 141 S.Ct. 238 (2021) (schools may in some instances regulate student speech off campus, but here, the school violated the student’s First Amendment rights when it suspended her from the cheerleading squad for a private social media post that contained vulgar language but was not materially disruptive to the school setting).

Tinker and *Hazelwood* involved three students while *Morse* and *Fraser* involved the actions of individual students. *Tinker* noted that out of 18,000 students, only a handful wore black armbands, and only five were suspended for wearing them. *Tinker*, 393 U.S. at 737. One can also look to *Hazelwood* as it concerns school-sanctioned activities, which is precisely what a student organization would be as discussed in this opinion. Although not explicitly addressed, it follows from *Tinker* and *Hazelwood* that the same rubric applies to student organizations and groups as it does to individual students regarding First Amendment protections and restrictions.

General Policy Considerations for Public School Corporations

BLM’s classification as a political organization raises important policy considerations that public school corporations must address when determining what is permissible in their classrooms. Each school corporation is responsible for ensuring its adopted policies and programs stay within the bounds of state academic standards and the curriculum approved by the General Assembly.⁸ They should exercise extreme caution if choosing to permit or promote some politically charged

⁷ Government policies implemented with the effect to compel speech have historically been held by the U.S. Supreme Court to violate the First Amendment. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (The state policy constituted “a compulsion of students to declare a belief...it requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeak”). Conversely, policies implemented with the effect to restrict speech have been held as violative of the First Amendment. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (referring to “[t]he right to speak and the right to refrain from speaking” as “complementary components” of the First Amendment).

⁸ Ind. Code § 20-30-5-21: A state accredited school may not offer, support, or promote any student program, class, or activity that provides student instruction that is contrary to a curriculum required to be provided to students under this chapter.

topics or organizations within the walls of their institutions while prohibiting or excluding others.⁹ As governmental entities, school corporations would likely face a monumental task defending themselves against claims of arbitrary and capricious¹⁰ decision-making, resulting in the prioritization of one organization's set of beliefs over another, as well as compelled speech upon their students.

First Amendment rights are not absolute and school corporations may reasonably regulate them, "consistent with fundamental constitutional safeguards, to prescribe and control conduct" in schools. *Tinker*, 393 U.S. at 507. However, the policies must be *reasonable* and implemented uniformly and consistently. In *Tinker*, the Court noted the school district's policy prohibiting students from wearing black armbands as a silent protest of the Vietnam War. Yet, at the same time, there was evidence in the court record other students in that same district "wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism." *Id.* at 510. The Court took issue that the policy prohibiting the wearing of armbands prohibited none of these items and only singled out the opposition to the Vietnam War. *Id.* at 510-11. As the Court well-stated, "[c]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.* at 511 (emphasis added). **The crux of *Tinker* is not only can a school corporation not prohibit non-disruptive expression of political expression by students, it also cannot pick and choose what political speech it wants to promote and what speech it wants to suppress.**

School corporations should be mindful to adopt neutral policies regarding the display of signs and other materials that are applied in a uniform and consistent manner to not favor any political group or organization. They must ensure if they permit signs, displays, and other expressive materials or speech promoting one political organization, such as BLM, they must allow the same for **all** political and similar organizations. Likewise, if the school organization prohibits one political or similar organization from displaying signs or other expressive materials or speech, it must prohibit **all** political and similar organizations from displays, promotions, and exhibitions in its schools and on its premises, including BLM and other similar organizations.¹¹ This uniform applicability will reduce concerns of First Amendment violations or potential claims about

⁹ Additionally, Ind. Code § 3-14-1-17(d)-(e) prohibits a government employee (which includes an employee of a political subdivision, such as a public school corporation) from using the property of the government employer to participate in certain political activities or distribute campaign materials. A violation of this section is a Class A misdemeanor.

¹⁰ Generally speaking, when a court reviews for arbitrary and capricious decision-making, it will look for "consideration of relevant factors" and "clear error of judgment." 60A Am. Jur. 2d Pensions § 369. Regarding review of administrative decision making and agency actions, courts will examine whether there was an abuse of discretion and if there is a satisfactory or justified reason for the action in question. 2 Am. Jur. 2d Administrative Law § 476. School officials should be aware that arbitrary decision-making may violate Title VI of the Civil Rights Act of 1964 ("Title VI"), which protects students who attend federally funded schools from discrimination and race-based harassment. There may also be Fourteenth Amendment Equal Protection Clause concerns to consider if a court determines a school corporation has made an arbitrary and capricious decision regarding expression concerning a protected class of citizens.

¹¹ Please note, per *Tinker*, a policy must not include clothing, armbands, or similar articles that are non-disruptive to the learning environment (unless the school has adopted a school uniform policy, which courts have held to be constitutional).

arbitrary and capricious decision-making. It will also ensure the focus remains on the mission of our schools – educating our children.

It is important to note that Ind. Code § 20-30-5-0.5 provides that the United State flag shall be displayed in each classroom of every school in a school corporation. This specific symbol has been clearly authorized as not only appropriate but mandated. This however is in accordance with the many instances where patriotism is a required teaching topic in Indiana schools. In addition to the display of the flag, students must be afforded the opportunity to voluntarily recite the Pledge of Allegiance daily.¹²

CONCLUSION

BLM is unequivocally a political organization. Although careful consideration should be given to First Amendment considerations anytime one considers whether to circumscribe specific speech, the display of political materials in a K-12 setting is unlikely to be subject to First Amendment protections. School corporations are responsible for complying with state educational standards and must ensure that their policies and procedures do not run afoul of state law. Consequently, the Office of the Attorney General strongly encourages public school corporations to update policies in light of this opinion to ensure classrooms remain politically neutral and applied in a consistent, uniform manner. Only then can we ensure students, staff, and administrators within our schools are not proceeding contrary to the protections the First Amendment affords us.

Sincerely,



Todd Rokita
Attorney General of Indiana

John Walls, Chief Counsel, Advisory
William H. Anthony, Asst. Chief Counsel, Advisory
Philip Gordon, Section Chief, Advisory
Hilari A. Sautbine, Senior Deputy Attorney General

¹² Ind. Code § 20-30-5-0.5 provides that the United States flag shall be displayed in each classroom of every school in a school corporation and each school corporation shall provide a daily opportunity for students of the school corporation to voluntarily recite the Pledge of Allegiance in each classroom or on school grounds. A student is exempt from participation if the student or the student's parent chooses for them to not participate.